Date Issued: July 24, 1998

In the Matter of:

STEVE COPPOCK

Complainant

Case No. 98-SWD-2

v.

NORTHROP GRUMMAN CORP.

Respondent

APPEARANCES:

DAVID K. LINE, ESQ.

For The Complainant

WILLIAM C. STROCK, ESQ.
CARRIE O' CONNOR, ESQ.
KEVIN P. McGLINCHEY, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Solid Waste Disposal Act (herein "the SWD"), 42 U.S.C. § 6971, and Section 507(a) of the Federal Water Pollution Control Act (herein the FWPCA), 33 U.S.C. § 1251 et. seq., and the pertinent regulations at 29 C.F.R. Part 24. On October 28, 1997, Steve Coppock (Complainant) notified the Department of Labor of his administrative complaint against Northrop Grumman Corporation (Respondent). The matter was referred to the Wage and Hour Division of the United States Department of Labor (DOL). An initial investigation by the DOL, Wage and Hour Division found that Complainant was terminated for legitimate business purposes. Respondent filed a timely appeal.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing in Dallas, Texas which commenced on March 17, 1998 and closed on March 19, 1997. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence: [1]

Complainant Exhibit numbers: 1-17;

Respondent Exhibit numbers: 1-41;

Administrative Law Judge Exhibit numbers: 1-4.

Post-hearing briefs were received from Complainant and Respondent on June 22, 1994. [2] Based upon the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. ISSUES

Whether Respondent's alleged discriminatory conduct toward Complainant violated the employee protection provisions of the SWD and FWPCA.

Complainant's complaint filed with the undersigned on January 20, 1998, pursuant to the pre-hearing order (ALJX-2), alleges the following acts by Respondent to be retaliatory in response to his protected activity:

> Paragraph 10: Respondent attempted to coerce (an act of retaliation) Complainant into withdrawing his claims and changing his story;
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> Paragraph 13: Respondent retaliated by breaching [Complainant's] confidences and releasing his name to the labor union personnel and other persons in the plant. "The leak . . . to the union, fellow plant members, and ultimately the public, was done maliciously and without provocation or justification, and for the purpose of

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[1] References to the record are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-__.

[2] Complainant submitted his post-hearing brief by facsimile on June 22, 1998. A copy of Complainant's post-hearing brief was received by mail on June 24, 1998.

retaliating or discriminating against [Complainant]."

Paragraph 14: Respondent subjected Complainant to "harassment and duress on the job" and knew, or should have known, that Complainant was "subjected to threats of bodily harm, public contempt, and ridicule and that he was being intimidated and abused by co-workers . . . nevertheless [Respondent] knowingly and wilfully failed to take any corrective action to stop the harm or to protect [Complainant] [and] "allowed the offensive conduct to continue, and in this manner . . . either created, or knowingly abetted in the creation of a hostile work environment. . . ."

Paragraph 15: Respondent subjected Complainant to a random drug test "which was in violation of company rules and which was taken without the observance of appropriate medical protocol . . . " and thereafter terminated Complainant because he "failed the drug test."

Paragraph 16: Complainant was "not ever subject to dismissal for this drug test result . . . on account of the fact that the company did not follow its own internal procedures for requiring an impaired worker to seek drug rehabilitation after his <u>first</u> offense of discovered drug usage."

II. SUMMARY OF THE EVIDENCE

Testimonial Evidence

Complainant

Complainant is married and has four children. He is thirty-nine years of age. Complainant has worked for Respondent for fifteen years, beginning his employment on August 27, 1982. He served in the U.S. Navy from 1975 through 1977 at which time he was medically discharged. [3] (Tr. 51-52). Complainant has not returned

[3] Complainant testified that work restrictions had been issued to him in the past because of a knee injury suffered while in the military. (Tr. 118). According to Complainant, his knee condition was aggravated on July 7, 1997, before the spillage occurred, while working for Respondent, when an emergency situation occurred that required him to "run up and down" a flight of stairs several times. (Tr. 198-199). A functional

to any job position since he was terminated by Respondent. He explained that he "has an application ready." (Tr. 202).

Complainant worked in the powerhouse and in the Industrial Waste Treatment Plant (IWT) at Respondent's facility. The powerhouse supplies electricity, air, and water. (Tr. 52-53). In July 1997, Complainant performed various jobs in the powerhouse which included operating boilers and chillers, taking outside readings, plant maintenance and operating a computer. He stated that electrical work was not part of his duties. (Tr. 57-58).

The IWT plant provides treatment of waste and hazardous materials from Respondent's aircraft production facility. (Tr. 52-53, 58). Complainant testified that in the IWT plant, his work activity involved "run[ning] the filter presses" to treat the hazardous waste. The hazardous waste is transported through an effluent line from Respondent's plant to a location in the City of Dallas, where it is further processed. According to Complainant, Respondent is not to send hexavalent chrome to the City of Dallas that exceeds 2.0 parts per million. Complainant testified that on several occasions Respondent had exceeded the contractual amount of 2.0 parts per million in violation of the agreement with the City of Dallas. (Tr. 58-59, 66).

Complainant testified he has received promotions and raises during his employment with Respondent. The year prior to his termination he earned approximately $60,000.00 per year at $26.80 per hour. According to Complainant, he worked a significant amount of overtime to raise his earnings up to his current annual level. Moreover, he received benefits from Respondent, such as participation in its 401-K Pension Plan, medical insurance and membership in the Employee's Club. (Tr. 54-55, 201).

Complainant testified he is a member of the United Automobile Workers (UAW), Local Union 848 (herein the Union), and is considered a stationary engineer, a position within the collective bargaining of Respondent's employees represented by the Union. He served as a union steward from 1985 through 1986. (Tr. 56-57).

On July 31, 1997, Complainant arrived at work at the IWT plant and noticed that the hexavalent chrome levels being transported to the City of Dallas amounted to 5.72 parts per million. (Tr. 60-62). He began taking readings of the hexavalent chrome levels, which was part of his job as an operator. Complainant was

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capacity record indicates that Complainant was on temporary work restrictions beginning in February 1997 which extended through October 10, 1997. (RX-30). Complainant testified that for the past two years he had not worked within his physical restrictions. (Tr. 118).

instructed by Pat Wilson, Environmental liaison, to cut off the flow of hexavalent chrome going to the City of Dallas. According to Complainant, shutting off the flow to the City of Dallas caused the hexavalent chrome to overrun the "tanks," run onto the ground and into a storm drain which flowed into a lagoon. The lagoon drained into Mountain Creek Lake, a residential/recreational lake. (Tr. 63, 80). Moreover, Complainant was instructed by Mr. Wilson not to enter, into the governmental log maintained at the facility, the hexavalent chrome readings which reflected the composition of the materials sent by the effluent line to the City of Dallas. Complainant testified that Mr. Wilson, Bruce Kaylor, [4] Bobby Oatman,[5] as well as an individual identified as "Mendez," who was the head of the environmental department for Respondent, were in the IWT plant during the events that occurred on July 31, 1997. (Tr. 62, 64, 70, 78).

Complainant was ordered by Mr. Wilson to wash off the hexavalent foam that had collected on a tank outside of the IWT plant. The foam had a reading of 100 parts per million "total chrome." According to Complainant, the solution which was on top of the tanks was the material which is sent to a hazardous waste dump. Complainant followed instructions and washed the foam to the ground. (Tr. 69). Complainant knew the foam was hexavalent chrome because it is visually evident by its gold color. (Tr. 73). Complainant testified that he retrieved a sample of the waste as it flowed from the lagoon into the lake. The sample reading showed "0.33" parts per million. (Tr. 63, 70-71, 76).

Complainant informed Joanne Hopkins, a union steward, of the events that were occurring on his shift. (Tr. 75). Ms. Hopkins told him that he had to make a decision whether to report the events. On August 1, 1997, Complainant called Respondent's "hot line" and was put in contact with Susie Kent, an "environmental attorney," who was employed by Respondent. (Tr. 76, 80-81). Complainant reported the events that took place on July 31, 1997. (Tr. 82). She requested he provide his name, phone number and clock number so she could contact him later. Complainant was reluctant to do so because of the confidentiality assured by Respondent's hotline, however, he provided the information to Ms. Kent. (Tr. 80-81).

As a result of his report, Complainant was interviewed on August 4, 1997 at Respondent's facility by Ms. Kent, Frances Phillips, "an environmental attorney" employed by Respondent, and Kevin McGlinchey, another attorney employed by Respondent. (Tr. 83-84). Mr. McGlinchey explained to Complainant that this was a confidential matter and he was not guaranteed representation by the

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[4] Mr. Kaylor was Complainant's supervisor. (Tr. 62).

[5] Mr. Oatman was Complainant's co-worker. (Tr. 63).

union, since their discussion would not likely lead to discipline of Complainant. At that time, Complainant signed a form acknowledging that he was not guaranteed union representation. (RX-28). Complainant related the events of the July 31, 1997 spillage. Complainant testified that the meeting ended by the attorneys informing him they would talk to the other employees Complainant identified as being involved in the incident. Complainant reported for his shift following the meeting. (Tr. 84-85).

On August 8, 1997, Complainant was called to meet with Ms. Kent and Ms. Phillips for a second interview. At this meeting, Ms. Phillips asked Complainant if he possibly observed water flowing into the lake and not hazardous waste. (Tr. 88). According to Complainant, he complained to Ms. Kent and Ms. Phillips that Respondent had not yet made an effort to clean the spillage area. He continued to see a six to eight foot ring of dried brown foam around the tank from which he had washed the foam on July 31, 1997. He informed Ms. Kent and Ms. Phillips that he would go to the Environmental Protection Agency (EPA) to protect himself from the events of July 31, 1997. (Tr. 89-90). Complainant was informed that Respondent was still investigating the matter. (Tr. 91).

Complainant testified that on August 9, 1997, he was told by Shorty Sutton, a union committeeman, [6] that B.J. Meeks [7] informed Mr. Sutton that Mr. McGlinchey reported Complainant had informed Respondent of the spill. In addition, according to Complainant, Ms. Hopkins confirmed Mr. Meeks' statement to Mr. Sutton regarding Complainant's report of the spillage. (Tr. 93). Moreover, Complainant was later informed by Mr. Oatman that he had heard Complainant reported the spillage to Respondent. Complainant testified that he denied reporting the incident to Respondent. (Tr. 94, 97).

On August 10, 1997, Complainant met with Ms. Kent and Ms. Phillips for a third interview. Complainant informed them that his name had been released to the union and co-workers were aware he reported the spillage. (Tr. 95). Ms. Kent and Ms. Phillips telephoned Mr. McGlinchey to ask him if he released Complainant's name to the union. According to Complainant, Mr. McGlinchey

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[6] The undersigned refused to issue subpoenas at the request of Complainant in the absence of explicit statutory authority. Oliver v. Hydro-Vac Services, Inc., Case No. 91-SWD-1 @ 2 (ARB Jan. 6, 1998)(no subpoena power granted to the DOL in either the SWD or the FWPCA). The union refused to permit Shorty Sutton and Joanne Hopkins to testify in this matter even though Respondent agreed to produce them as employee witnesses within its control.

[7] Mr. Meeks was the plant grievance chairman. (Tr. 94).

indicated he informed Mr. Meeks that he wanted to speak to Complainant. (Tr. 96). In addition, Mr. McGlinchey was asked if he released the names of the other six employees involved on the second shift of July 31, 1997 incident, to which he responded negatively. (Tr. 97).

Complainant explained that before he used his vacation time in late August 1997, he was a "nervous wreck" because of the spillage incident and the events that occurred since he reported it. In addition to being interviewed several times by Respondent's attorneys, Complainant was interviewed for six hours by an EPA representative. (Tr. 113-114).

Complainant continued to report for work until late August 1997. (Tr. 101). Because of the events related to the spillage and other events related to his family, [8] on August 20, 1997, Complainant requested an opportunity to take three weeks of vacation leave. Complainant's request was approved. (Tr. 99-100). He explained that the work environment was "stressful" because he was concerned about how his co-workers would react to his report of the spillage. (Tr. 101). Complainant testified that Respondent called him "up front" on several occasions and called "up front" the co-workers whom he identified earlier as being present during the spillage. (Tr. 107). Complainant did not provide any specific examples of poor treatment, intimidation, abuse or harassment by his co-workers from the time his name was released until he went on vacation in late August 1997. (Tr. 101-107).

Complainant testified that after the July 1997 spillage, he went to see Dr. Ray Smith, family practitioner, because of the stress he was experiencing at home and at work. According to Complainant, Dr. Smith prescribed Halcyon as a sleep aid and extended his current prescription of Prozac. (Tr. 290-291). It should be noted that in April 1997, Complainant reported using "Halician." (See RX-4).

Complainant returned to work on September 14, 1997. (Tr. 115). Upon returning to the facility, Complainant noticed that when he entered the break room before commencing his shift, five co-workers got up out of their chairs and left the break room without saying anything to him. Complainant acknowledged that these five men were not on his shift, however, they were "all real good friends of mine." (Tr. 124). Moreover, he had never seen co-workers "clear a room" because one man entered it. Complainant testified that he attempted to speak to two of the men, but they ignored him and left the room. (Tr. 115).

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[8] Complainant explained that his daughter had undergone "open heart surgery" which caused "enough stress on [him] to kill [him]" according to Complainant's counselor, prior to his April 1997 positive drug test. (Tr. 102, 154, 168, 218).

Complainant heard his name mentioned throughout various conversations between his co-workers. He was told by his co-workers that a rumor was being discussed that Complainant reported the July 31, 1997 spillage. He denied the accusations, however, he felt he was "put on a pressure spot." (Tr. 108). Complainant felt "labeled" as the person who "turned it in." (Tr. 109). Moreover, Complainant felt isolated because "a lot of the men didn't speak to [Complainant]." He requested to work "on the Board" so he could work by himself and avoid being ignored by his co-workers. (Tr. 130-132). Later, Complainant felt more isolated because he was denied permission to be taken "off the Board" and his co-workers were angry that he was able to regularly perform the easier work activity. [9] (Tr. 135).

Although Complainant was never directly physically threatened by any co-workers, he felt intimidated by Mr. Wilson's presence. (Tr. 111, 272). However, Mr. Wilson never verbally or physically threatened him after the spillage. (Tr. 259, 261). According to Complainant, Mr. Wilson went to the IWT plant after being instructed not to enter that particular area. However, Complainant acknowledged that he was not present when Mr. Wilson was at the IWT plant. [10] (Tr. 272).

In addition to the break room incident, on or about September 15, 1997, Louis Gentry, a lead man at Respondent's facility, gave Complainant a list of outside duties to be performed. [11] (Tr. 235). The list included an instruction to replace a cover to an electrical panel on a chiller which was located in the equipment room. According to Complainant, he did not usually perform this work activity because it was performed by electricians. [12] He explained that the only "electric we mess with is [the] switch gear in the powerhouse." Complainant did not protest performing the irregular work activity because he did not want to "cause any

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[9] Complainant explained that he was informed he could not work "off the Board" because the work assignments required activity outside of his work restrictions. (Tr. 134-135).

[10] Complainant explained he was intimidated by Mr. Wilson because a few years prior to the July 1997 spill, Complainant filed a grievance against Mr. Wilson who had threatened Complainant in some manner. Complainant did not explain the specific details of any alleged actions by Mr. Wilson in the past. (Tr. 291-292).

[11] According to Complainant, the list was prepared by Mr. Kaylor and it instructed Mr. Gentry or Don Simmon, lead man, to have the "outside man" complete the work. (Tr. 117, 236; RX-32).

[12] The other duties were usual duties performed by Complainant. (Tr. 237-240).

waves." [13] In addition, Complainant requested to perform the list of duties by himself because his co-worker, Mr. Oatman, was not speaking to him and appeared angry with him. Complainant wanted to avoid a confrontation with Mr. Oatman. (Tr. 118-120).

Complainant testified that when he was placing the cover onto the electrical panel, he received a "jolt" that knocked him to the ground and caused his arm to go numb. Moreover, Complainant experienced trouble breathing for a few minutes. The incident report, which is signed by Complainant, does not list these "injuries" described by Complainant during his testimony. (See CX-14). Complainant informed Mr. Gentry of the electrical shock and was instructed not to complete the job because it was "not our job" and to "just leave the panels." Complainant completed the remaining work assignments on the list. (Tr. 119-120). He did not seek medical attention for the "electrocution." (Tr. 123). Mr. Gentry left a note describing the incident for Mr. Kaylor so he could complete an incident report. (Tr. 121). Mr. Kaylor did not complete the incident report for two weeks. (Tr. 121; See RX-36).

At an undetermined time, Complainant complained to Ms. Kent, Mr. McGlinchey and Ann Blackshire, whose job position is unknown, that his co-workers were shying away from him and that he was losing his career because of his activities in reporting the environmental spill. Complainant explained that if there is a conflict between the employees, the work activity can be unsafe because the employees are dependent upon each other for safety backup. (Tr. 116-117). On September 23, 1997, Complainant complained to Ms. Kent and Ms. Phillips that he felt a sense of isolation and a fear of a safety risk because he was relying upon co-workers to assist him in the performance of his duties. [14] (Tr. 126). As a result of the meeting on September 23, 1997, he was offered re-training for a new job, which he declined. Complainant explained that he was not provided with information such as a job title or salary. In addition, he declined the offer because he had spent "all his life" training for his current job position. (Tr. 128-129).

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[13] Complainant explained that in the past, he had replaced condenser and chiller covers, however, he had never replaced an electrical panel because it was not work activity he was required to perform. He asked Mr. Gentry to explain why he was being assigned to perform this particular type work. (Tr. 236; See RX-32).

[14] The record is devoid of any specific event in support of Complainant's accusation. There is no evidence that any employee refused to work with him or exhibited overt animus toward him. Moreover, Complainant did not complain to any supervisor that he had a concern for his physical safety.

Complainant testified that he would have transferred to another work shift if he had been reassigned. He had no problems with the third shift which reported at 11:00 p.m. at night. (Tr. 124). He later testified that despite the allegations of harassment and intimidation on his shift, he never asked to change shifts to avoid such confrontations. (Tr. 264).

On September 16, 1997, Complainant requested Mr. Kaylor to assign him to the control board for a couple of days. (Tr. 210). He thereafter asked Mr. Gentry to allow him to work a normal shift but was informed that Ms. Parker insisted he work within his work restrictions. (Tr. 204-205). Complainant worked on the board until he was terminated on October 8, 1997. Complainant testified that because he was working the board, which was a preferential assignment, his co-workers began complaining because the board work was an easier job and he was being assigned to the board on every shift. [15] (Tr. 135-136). Complainant later testified that he was not permanently assigned to work the board until after his meeting with Ms. Parker and Mr. McGlinchey which occurred on September 30, 1997. (Tr. 282-284, 286-287). Complainant testified that he was forced to work the board for only one week until he was terminated. (Tr. 284). Complainant believed he was assigned "regular jobs" working with his crew from September 17 through September 30, 1997. (Tr. 284).

At an undetermined time, according to Complainant, Mr. Kaylor stated to him and other co-workers that he believed Complainant "did the right thing." [16] (Tr. 196-197). In addition, at an undetermined time, Complainant was provided a copy of a memorandum by a co-worker from Larry Skinner to Joe Bechtel, dated August 1, 1997, which stated that the chrome levels on July 31, 1997 remained below the limit permitted to be sent to the City of Dallas. [17] (Tr. 230-231; CX-1).

On September 30, 1997, Margo Parker requested a meeting with Complainant to discuss various issues that he had raised. (Tr.

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[15] Complainant recalled Mr. Oatman, on one occasion in the break room, commenting that "he was sick of these crippled people." Complainant attributed the comment to his knee restrictions rather than his report of environmental concerns. (Tr. 189-190).

[16] Mr. Kaylor denied stating Complainant "did the right thing." (Tr. 532).

[17] Complainant explained in an earlier affidavit that he found the memorandum lying on a table in the powerhouse. (Tr. 232). He further explained at the hearing that a co-worker had laid the memorandum down on a table and told Complainant to read it because it pertained to him. (Tr. 230).

273-274). During the meeting, Ms. Parker discussed with him the shock incident, the release of his name to the union, and the release of information concerning his suspension in April 1997 based on the positive drug test. (Tr. 220, 277). He acknowledged that both Ms. Parker and Mr. McGlinchey asked him what they could do to help his situation. He informed them that his assignment at that time, which was working on the board, was "okay." (Tr. 281).

On the Tuesday prior to Complainant's October 3, 1997, Friday drug test, Complainant attended a dinner meal which was cooked by shift employees. [18] (Tr. 166-169). Upon arriving in the break area to eat his meal, Doug Whited and George Pullen, co-workers, informed Complainant that his steak was on the counter. (Tr. 215). The steak had been removed from the grill, wrapped in foil, and was sitting on the counter. Complainant explained that other steaks were still cooking on the grill. (Tr. 166-170). Complainant sat down and ate with his co-workers although they were not speaking to him. (Tr. 170). He testified that his steak did not appear to have any topping or seasoning on it. (Tr. 215).

Complainant submitted a urine specimen for a drug test on October 3, 1997. [19] (RX-14). He testified that he did not smoke marijuana prior to this drug test. (Tr. 219). He explained that he usually checked with Respondent's nurse after a few days to learn of his test results. A few days after he submitted the sample, Complainant requested the results from the nurse who informed him that his records were locked in the cabinet. According to Complainant, the medical records are usually in an open file cabinet located in the lobby. (Tr. 170-172). The following day, Complainant was informed by the "medical review doctor" that he tested positive for marijuana. (Tr. 172-173). Complainant testified he informed Respondent's physician that the employees cooked a weekly dinner meal the previous Tuesday. Complainant and the physician discussed the possibility of someone placing marijuana on his steak. (Tr. 173).

After Complainant was interviewed by Respondent's physician, David Whitney, labor relations manager, was informed of Complainant's positive test. Complainant explained the Tuesday

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[18] Complainant recalled that he arrived at the break room late because he "was running the filter presses at the IWT" and he had to complete loading "them back up." (Tr. 169). Complainant could not recall exactly why he was at the IWT since he was assigned to the control board. (Tr. 214).

[19] Complainant testified that he disclosed using various prescription medications such as Halcyon, Prozac, Zantac, and Niacin in October 1997, all of which he had consumed since his April 1997 positive test. (Tr. 293-294; See RX-4; RX-13).

steak dinner meal to Mr. Whitney, however, Mr. Whitney terminated him pursuant to the collective bargaining agreement on October 8, 1997. (Tr. 175-176, 179, 216). On October 9, 1997, he had an independent test conducted by another laboratory, at his expense, which resulted in a negative test. (Tr. 179; RX-19). Complainant gave the negative test result to Mr. Hall of the Union. (Tr. 182). Upon giving the negative test to Mr. Hall, Complainant was informed by union representatives that he would be represented, however, Complainant was later informed that he would not be represented by the union. (Tr. 183).

Complainant explained that he had tested positive for the presence of marijuana in April 1997. He alleges that the provisions of Letter of Agreement 31 (LOA 31), which embodies the drug testing program between Respondent and the local union, were not followed in April 1997. According to Complainant, the policy required him to begin a drug rehabilitation program during the mandatory five days of suspension and then attend "some follow-ups" once he returned to work following the suspension. Complainant testified that upon testing positive for marijuana in April 1997, he was not advised of the requirement to attend a rehabilitation program. He testified that he met with Ray Scott of Labor Relations and union steward Hopkins as a result of the April 1997 positive test. (Tr. 151-154).

According to Complainant, he informed Mr. Scott that he was then seeing a family counselor for "stress" and Mr. Scott must have assumed he was undergoing drug counseling. (Tr. 154-155). Mr. Scott gave Complainant a "1-800 card" and told him to "just hold onto [the card]." Complainant acknowledged signing two memoranda which indicated he was being suspended for five days and that he was required to attend a drug rehabilitation program during the suspension period, however, he did not read the memoranda at any time. (Tr. 155, 220; RX-8; RX-9). According to Complainant, Mr. Scott indicated the lower portion of the work suspension memorandum concerning the drug treatment program did not apply to Complainant since he was already attending counseling sessions. (Tr. 221-222). Complainant did not receive copies of the memoranda he signed. Moreover, Complainant had not read LOA 31 although it was previously provided to him. (Tr. 223-224). Complainant testified that at no time did his union representative specifically explain his responsibilities according to LOA 31 following a positive drug test. (Tr. 225).

Complainant testified that in April 1997, upon his return after a five-day suspension, he requested his badge from the guards at the entry gate, however, the guards could not locate his badge. Mr. Scott was contacted and arrived at the entry gate. According to Complainant, Mr. Scott asked if he had a medical release for which Complainant expressed ignorance. Complainant testified that he was unaware of the rehabilitation treatment requirement and explained to Mr. Scott that he was not informed of such a

requirement. Mr. Scott then commented, in front of the entry gate guards, that Complainant was suspended for failing the drug test and was required to submit a doctor's release form. Mr. Scott gave Complainant a doctor's release form, instructed Complainant to have the form completed, and then allowed Complainant to return to work the same day, before the form was completed. (Tr. 156-157).

Complainant reported for work the following day with the form uncompleted. (Tr. 158). Complainant contacted Ms. Hopkins and informed her about the doctor's release form given to him by Mr. Scott and that neither his primary physician nor his family counselor would complete the form because they did not examine him for drug rehabilitation purposes. Ms. Hopkins informed Complainant that the union did not "get involved in this," but she contacted Mr. Sutton. Complainant met with Mr. Sutton, Mr. Meeks, and Mike Hall, the local Union president, and was informed he would "just need to get into a treatment program since . . . they didn't explain all this, and didn't give you the form and all this." (Tr. 159).

Complainant testified he used the "1-800" card given to him by Mr. Scott and later was interviewed by a counselor. (Tr. 159). The counselor informed Complainant that there were only night classes available. Complainant was unable to make arrangements to attend the treatment classes because his work schedule required him to work at night. (Tr. 161). Complainant testified he informed Mr. Sutton of the scheduling conflict between the classes and his work schedule. According to Complainant, Mr. Sutton informed him "just to get the forms signed, not to worry about the treatment program, . . . and just go back to work, and test every thirty days." (Tr. 162, ln. 3).

The following day, Complainant returned to the counselor and asked him to sign the doctor's release form. The counselor agreed to sign the release form but informed Complainant he would have to report to Respondent that Complainant was not in a treatment program. Complainant returned the signed form to David Airstrip, Respondent's Employee Assistance Program representative. (Tr. 162, 164). According to Complainant, the incident was not again mentioned to him and he was tested every month. (Tr. 162, 164). Complainant explained that he would not risk a second positive test for smoking marijuana since it would be analogous to burning his house down because of the effect it would have on his family and his career. (Tr. 166).

Complainant testified that before he was terminated, his wife reported to him that a red car sat outside of his house at two separate occasions in one day. Complainant's wife reported the

incident to the police. (Tr. 194). [20]

Bruce Kaylor

Mr. Kaylor testified he is a team leader in the powerhouse and has been so since 1994. He has been employed by Respondent since 1979. (Tr. 503-504). He testified he had no problems with Complainant on the job. It was his understanding from his supervisor that Complainant was terminated for violation of company work rules, but did not know what specific rules had been violated. (Tr. 504-504).

Mr. Kaylor testified he was not aware Complainant reported the July 31, 1997 incident to the company. According to Mr. Kaylor, he heard numerous conversations between many employees working on the first and second shifts in the power plant and the IWT plant who speculated that Complainant was the individual who reported the July 1997 incident to Respondent. (Tr. 505-507, 510-511). Mr. Kaylor explained that these employees did not appear to be angry or upset with Complainant but curious about the employees being interviewed by Respondent. (Tr. 508-509).

According to Mr. Kaylor, he was not “glad” to see Complainant be terminated. Moreover, Mr. Kaylor did not witness Complainant's co-workers express any satisfaction about his termination. (Tr. 522).

Mr. Kaylor testified that working around the equipment in both the power house and the IWT Plant could be highly dangerous and people could be hurt in the event of malfunctioning equipment. According to Mr. Kaylor, Complainant and his co-workers were getting along well enough, following the July 31, 1997 incident, to perform their work activity in a highly safe manner. (Tr. 512-513).

Approximately seven to ten days following Complainant's “electrocution” incident in September 1997, he requested to be assigned to the board. (Tr. 513, 515). According to Mr. Kaylor, Complainant stated he wanted to work in a job position where he could work alone because he had the “general impression that the men did not want to be around him, and they did not like him.” (Tr. 514, ln. 5).

When Complainant informed Mr. Kaylor of the co-worker’s views towards Complainant, Mr. Kaylor was surprised because he had not picked up on their reactions prior to Complainant informing him of their sentiments. (Tr. 516). Mr. Kaylor could not recall whether

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[20] Complainant acknowledged that he had no evidence, other than supposition, to connect Respondent with the car in the vicinity of his house. (Tr. 296).

Complainant told him that he was experiencing retaliation from his co-workers, however, he did recall Complainant mentioning the break room incident of employees walking out of the room without talking to him. (Tr. 527-528). Because of Complainant's concerns, Mr. Kaylor convened a meeting with some of the employees from the first and second shift. Complainant's co-workers stated to Mr. Kaylor that they did not believe they shunned or mistreated Complainant. (Tr. 516, 527-528). Mr. Kaylor testified that a few days after the meeting occurred, Complainant informed him that things were better between him and his co-workers. (Tr. 532-533).

Mr. Kaylor became aware of the incident where Complainant was electrocuted on the following morning. He received a note from Mr. Gentry relating Complainant's report of being electrocuted. Mr. Kaylor did not complete an incident report until ten days later since Complainant did not request medical treatment nor did he report to Respondent's medical facility. Mr. Kaylor considered the incident as minor. He testified that he was unaware of Respondent's policy regarding the amount of time in which an injury report should be completed following an incident. (Tr. 517).

According to Mr. Kaylor, Complainant was electrocuted when he was performing work activity which Mr. Kaylor described as placing a panel over a piece of machinery and screwing a number of screws into the cover to attach the cover onto the chiller. [21] It was Mr. Kaylor's opinion that such work was not an electrician's job. Mr. Kaylor was unaware whether Complainant or any other person "on his team" had performed this particular work activity in the past, however, he testified that "covers are removed and replaced all the time." (Tr. 517-518, 521). He explained operators are instructed to replace panels and electrical covers whenever they are removed on a piece of equipment that "belongs to the powerhouse." A chiller is a piece of equipment that belongs in the powerhouse. (Tr. 535). Mr. Kaylor acknowledged that electricians are assigned to the second shift, however, he was unaware whether any electricians were available to perform such work on that particular day. (Tr. 519).

Because of Mr. Kaylor's potential involvement in an ongoing EPA investigation, he was advised by his attorney to refuse to answer any questions which relate to the July 31, 1997 incident, including questions which may not have been a direct implication of Mr. Kaylor's involvement but provided corroborative evidence of Complainant's contact with him during the alleged incident. Counsel for Complainant was allowed to complete a bill of exceptions by stating that he would ask Mr. Kaylor the following

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[21] Mr. Kaylor testified he was unaware there was an exposed wire where the panel covered the chiller. Mr. Kaylor created the work activity list, however, he was unaware of who would subsequently perform the work assigned. (Tr. 534-535).

two questions: (1) whether Complainant informed Mr. Kaylor on July 31, 1997 that hexavalent chrome was running into the lake, and (2) "did Complainant ask you why he was being asked to forge an entry into the logbook?".

In view of the totality of circumstances, including Mr. Kaylor's potential involvement in EPA litigation, the undersigned ruled that such questions could not be propounded to Mr. Kaylor since his counsel advised him not to answer those questions whether because of self incrimination or his potential involvement. (Tr. 536-537).

Dr. James W. Woessner

Dr. James Woessner testified that he is a medical doctor and a board-certified forensic medical specialist. [22] (Tr. 312). He later indicated that he was also a psychiatrist. (Tr. 332) Moreover, Dr. Woessner testified he is trained as a scientist in biology for which he obtained a doctorate degree. He is a member of the American Academy of Physical Rehabilitation Specialists, the American Academy of Forensic Medical Specialists, the American Academy of Forensic Medical Examiners and the American Academy of Pain Society. (Tr. 312-315; CX-16). According to Dr. Woessner, he does not have any particular certification "in substance abuse treatment or drug testing" nor is he a certified medical review officer. Furthermore, Dr. Woessner has not been involved in the process of actually testing samples for the presence of drugs. (Tr. 332). In the past, Dr. Woessner has reviewed drug test results with his patients. (Tr. 333).

Dr. Woessner testified that drug screen testing is within the scope of forensic medical speciality. He explained that a combination of his medical and biology training provides him with the appropriate expertise and experience to review the drug testing procedures used for Complainant's October 1997 drug test. (Tr. 315). He later testified that drug testing procedures and actual drug testing is not his area of specialty. (Tr. 351). Dr. Woessner reviewed RX-1 through RX-41. In addition, Dr. Woessner interviewed Complainant on one occasion. (Tr. 316). He testified that any opinion rendered would be based upon reasonable medical

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[22] According to Dr. Woessner, the field of forensic medical examination is multi-disciplinary and consists of a group of physicians and other health care professionals who "are dedicated to the pursuit of truth, objectivity, presenting medical information to usually a legal situation." (Tr. 315). He received his board certification from the American College of Forensic Examiners which required no special training but just a review of his credentials. (Tr. 334). Dr. Woessner further explained that his board certification is in electro-medicine which is unrelated to drug testing. (Tr. 336).

certainty or probability. (Tr. 317).

After having reviewed Respondent's exhibits and having spoken to Complainant, Dr. Woessner opined that the procedures followed and the actual test used for Complainant's October 3, 1997 drug test performed by Respondent were reliable and valid. However, Dr. Woessner opined that the test results were not reliable for various reasons. (Tr. 321-328, 331).

Dr. Woessner testified that he considered the following seven factors when determining that the October 3, 1997 test result was not reliable: (1) Respondent's drug test results showed a negative result for opiates although Complainant was using hydrocodone which is an opiate (See RX-13; RX-15); (2) Complainant was using Lipitol, a cholesterol lowering agent, which may have affected the presence of marijuana in the fat tissues because marijuana is known to be stored in fat cells of the body; (3) it is possible to mix several urine samples while performing the test using a gas chromatograph; (4) if a urine sample was "concentrat[ed] . . . one time too many" while preparing it to be placed in the gas chromatograph, the result could show a doubling of the nanograms; (5) Complainant could have unknowingly ingested marijuana if the meat he ate at the weekly shift dinner meal was cooked with marijuana leaves absorbed into the fibers of the meat; [23] (6) an independent drug test was performed on October 9, 1997 which indicated no presence of marijuana; [24] and (7) Complainant tested positive for the presence of marijuana in April 1997 (RX-3), however, he tested negative for the presence of marijuana from May 1997 through September 1997 which indicated he was not a habitual user of marijuana. [25] (Tr. 321-328, 331, 352). Finally, Dr. Woessner testified that he

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[23] Dr. Woessner acknowledged he had never heard of placing marijuana leaves on a steak while cooking it. Moreover, he had not read a medical opinion indicating marijuana leaves cooked on meat would release marijuana chemicals into the meat and then into the body once the meat was consumed. (Tr. 353).

[24] Complainant's urine sample provided to Respondent was tested at a threshold level of 50 nanograms/ml, whereas Complainant's urine sample provided to an independent lab on October 9, 1997 was tested at a threshold level of 100 nanograms/ml. (Tr. 326; RX-19; RX-6; RX-2).

[25] Dr. Woessner testified the consistency of results would have been revealed as more "positives" if Complainant was a habitual user of marijuana. He further testified that the fact Complainant tested negative on September 17, 1997, positive on October 3, 1997, and then negative on October 9, 1997, revealed Complainant was not using marijuana on a regular basis. (Tr. 328, 331). LOA 31 does not differentiate between habitual or casual users of marijuana.

interviewed Complainant and found him to be trustworthy and thus, Dr. Woessner believed Complainant when he stated that he had not used marijuana. (Tr. 329).

Dr. Woessner acknowledged that the medications reported by Complainant before being tested in May, June, August and September 1997 were basically the same medications he reported using in October 1997. (Tr. 337-341). Dr. Woessner testified that Complainant's prior negative drug test results while taking the same medication do not necessarily support a finding that the medications did not affect the test results. He explained that the time period between when Complainant ingested his medication in relation to when he provided a sample for the drug test could have affected the test results. [26] (Tr. 341, 343).

Based on his review of a standard medical textbook, Dr. Woessner opined that Complainant's medications could have the following effects if they and marijuana were simultaneously consumed: (1) marijuana stays in the fat tissues longer, (2) marijuana stays in the fat tissues less time, or (3) the medications would have no effect. (Tr. 340-341, 343-344; See RX-21, p. 790). He explained that the disbursal rate of marijuana from the body is considered a "half-life" and that the 155 nanograms revealed by the October 3, 1997 test would have deteriorated in "a normal person" within a six day period to below 100 nanograms. (Tr. 349).

Dr. Stanley Weiss

Dr. Stanley Weiss testified that he has an osteopathic medicine degree. He is board-certified in general practice by the American Osteopathic College of General Practice and board certified in Occupational/Environmental Medicine by the American Osteopathic Board of Preventive Medicine. In addition, in April 1991, he successfully completed a certification training course in drug testing conducted by the National Institute for Drug Abuse. (Tr. 362-363; See RX-20). Dr. Weiss has acted as a medical review officer (MRO) for numerous companies such as Tandy Corporation, Bombay Corporation, Respondent, Miller Brewing Company and for numerous fire and police departments since 1985. [27] Dr. Weiss was

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[26] He testified that he had no evidence that the interaction of Complainant's medications could cause a false positive for marijuana. (Tr. 337).

[27] Dr. Weiss explained that an MRO is a physician who is trained to insure that all procedures are followed within a business according to federal, state and local law to protect the employees from harassment or undue burden placed upon them. The MRO directly supervises a business's drug testing procedures and programs. (Tr. 363-364).

the medical review officer who supervised Complainant's October 3, 1997 drug test. (Tr. 369-370; See RX-14; RX-15).

Dr. Weiss testified that Complainant's October 3, 1997 drug test showed negative results for all substances with the exception of marijuana. According to the test results, the amount of marijuana present exceeded Respondent's threshold level of fifty nanograms. (Tr. 370).

The October 3, 1997 drug test was first conducted using the Enzyme Multiplied Immunosassy Technique (EMIT). Because the EMIT test showed a positive result for the presence of marijuana, a confirmatory test was performed using Complainant's sample. The confirmatory test, known as a gas chromatography mass spectrometry exam (GCMS), is a specific test which shows not only the presence, but also the quantity of the tested illicit drug, which was 155 nanograms. [28] (Tr. 370-371). After receiving the positive drug test, Dr. Weiss interviewed Complainant. (See RX-16). Dr. Weiss explained that during his interview with Complainant, he attempted to help him recall what he did or did not do to cause a positive test, whether the employee may have been "duped" into using marijuana or whether he was using marijuana legally. (Tr. 372-373).

Dr. Weiss testified the MRO is the safeguard between the lab and the punishment meted out to the employee by a company. (Tr. 372-373). Complainant informed Dr. Weiss that he did not smoke marijuana and he was not aware of having ingested it. (Tr. 374). Dr. Weiss further testified that Complainant raised the possibility he could have ingested marijuana, however, he provided no specifics or explanation of how such ingestion may have occurred. (Tr. 402). Because Complainant could not provide an explanation for the positive test that "would be in any way construed as legal" and "there was no satisfactory or other information given that would lead [Dr. Weiss] to believe otherwise," Dr. Weiss confirmed that Complainant's October 3, 1993 drug test was positive and referred him to the "customer" relations representative for Respondent. (Tr. 374).

Dr. Weiss opined, hypothetically, if Complainant had consumed a steak, laced with marijuana, two days before the test, it was remotely possible, but highly unlikely, that such consumption would have resulted in a positive test. He explained that the ingestion rate of marijuana is much less effective than inhalation of the substance into the lungs and a "significant" amount must be ingested. The lungs have more blood vessels which absorb the drug more readily and in higher quantities. Dr. Weiss further explained that by ingesting the marijuana, there could possibly be a

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[28] The GCMS test has a threshold level of 15 nanograms/ml. (Tr. 371).

sufficient amount present to detect, however, the amount would "not meet the cutoff level of fifty nanograms per deciliter." (Tr. 374-375, 401-402). Based on the absence of any notation indicating otherwise, Dr. Weiss testified that Complainant did not report to him that his sample was taken improperly. (Tr. 376).

According to Dr. Weiss, Complainant's sample was split and only half of the specimen drawn was used to perform the initial test. The other half is preserved to allow an employee who tests positive to submit it to an independent laboratory to conduct a separate drug test. The split sample is maintained for one year. Dr. Weiss stated the normal procedure is to offer the employee who tested positive the split sample for re-testing at an independent lab at the employee's cost. [29] If it was not done in this particular case, it was because Complainant chose not to do so. (Tr. 376-377, 380).

Dr. Weiss testified the quantity tested by a drug test deteriorates in the body over a period of time and the speed of such deterioration varies from individual to individual. (Tr. 377-378). He explained that marijuana would probably still be present in an individual's system after five days. Because the amount of marijuana deteriorates, the concentration on a retest is not legally significant. It would not be unusual for the quantity of 155 nanograms/ml of marijuana to drop below 100 nanograms after five days. (Tr. 378-379).

Dr. Weiss explained that once he received a positive drug test for an employee, he would review the medications used by a donor. (Tr. 367; RX-13). Dr. Weiss reviewed the medications which Complainant indicated he was using at the time he submitted a sample for the October 3, 1997 drug test. (See RX-13). According to Dr. Weiss, the medications listed by Complainant have no cross-sensitivity to marijuana and therefore would have had no effect upon the positive test for the presence of marijuana. (Tr. 367). Dr. Weiss explained that hydrocodone could result in a positive reading on a drug test for opiates and Morphine/Codeine. He further explained that the negative reading for opiates on the October 3, 1997 drug test did not decrease the reliability of the test because it merely indicated that the patient was not prescribed a sufficient quantity to trigger a level which can "legally be called a positive test." (Tr. 368).

On cross-examination, Dr. Weiss testified the frequency of "false positives" in drug testing is "nil" because of the two completely different technologies used when the EMIT and the GCMS tests are conducted. The GCMS test is highly sophisticated and the

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[29] Gayle Blair, Respondent's medical clerk, testified that Complainant's split sample was maintained in a locked freezer. (Tr. 664).

frequency of false positives is below fifteen percent. The false positive rate for the EMIT is fifteen percent. (Tr. 381-382).

Dr. Weiss testified that if Complainant had informed him during the interview on October 8, 1997, that he was being set up by the company, Dr. Weiss would have certainly made a note of that complaint on his MRO form. (Tr. 383).

According to Dr. Weiss, Complainant's October 9, 1997 independent test is reliable. (Tr. 390). He opined that a cholesterol lowering medication might retard the disbursal of marijuana from the body or retard the excretion of marijuana through the liver function. He acknowledged that this was highly speculative and he would normally rely upon a toxicologist to pin point such matters to include the "half-life" of marijuana. (Tr. 391-392).

Dr. Weiss testified that he did not recall whether in October 1997, he was provided with Complainant's October 9, 1997 negative drug test result to consider in light of the October 3, 1997 positive test result. (Tr. 422).

Kevin P. McGlinchey

Mr. McGlinchey was called by Complainant as an adverse witness. Mr. McGlinchey is an attorney-at-law licensed to practice in the State of Pennsylvania and in the District of Columbia. He is employed as Senior Staff Counsel for Respondent. (Tr. 427-428).

He testified that on August 4, 1997, Susie Kent, attorney for Respondent, informed him that she wanted to conduct an investigation concerning an environmental matter. Ms. Kent informed Mr. McGlinchey of her intent to speak with Complainant because he was a member of the bargaining unit represented by the Union. She wanted to insure she acted appropriately and the proper procedures were followed. (Tr. 428).

According to Mr. McGlinchey, an employee has a right to union representation during any disciplinary interviews, however, under the U.S. Supreme Court case of "Weingarten," an employee is not entitled to union representation during the interview if it is reasonably likely not to lead to discipline. Such an interview would be considered an attorney-client privilege interview. (Tr. 429).

In this matter, Mr. McGlinchey first determined that Ms. Kent's interview with Complainant would not involve any disciplinary action taken against Complainant as a result of his report of the environmental incident of July 31, 1997. (Tr. 430). He then contacted Mr. Meeks, informed him that Complainant would be interviewed, and there was not likely to be any discipline issued

and therefore no union representation would be permitted. [30] Mr. McGlinchey did not recall whether he provided Complainant's name to Mr. Meeks. (Tr. 430). Mr. McGlinchey further testified he did not recall informing Mr. Meeks that Respondent was investigating an environmental matter. He acknowledged that later that day or on subsequent days he again contacted Mr. Meeks and informed him that Respondent wanted to speak to "all of the union people down at the IWT Plant." (Tr. 434-435). He testified that although he did not inform Mr. Meeks, he suspected these employees were employed on Mr. Coppock's shift at the IWT Plant. He acknowledged he did not provide specific names of the other individuals to Mr. Meeks. (Tr. 436-437).

Mr. McGlinchey testified that, since he has worked for Respondent beginning in February 1995, it has been his practice that once he determines that an interview with a union member will not result in disciplinary action, he contacts a union representative to inform him that Respondent will be conducting an interview with a union member and he will not be permitted union representation. (Tr. 430, 451). According to Mr. McGlinchey, this procedure is used "to balance the competing interest of Weingarten rights and concern for making sure there's no confusion and uncertainty at that point with the need to proceed with an attorney-client privileged investigation." This policy is not contained in any written agreement between the union and Respondent but is an understanding and practice between Respondent's personnel and union representatives. (Tr. 431-432).

Mr. McGlinchey testified that a "1-800" hotline number is maintained by Respondent and monitored by Stella Barrow, who is the Director of Ethics, EEO, Affirmative Action Section. [31] If such a complaint, as alleged by Complainant, was made to the company, it would have been logged by someone in Ms. Barrow's section. Mr. McGlinchey testified there was no record logged indicating Complainant called the "1-800" number on August 1, 1997, or during that time period. (Tr. 437-439, 441). According to Mr. McGlinchey, the Ethics Section would have created a file regarding Complainant's complaint and "not simply passed [it] off to the law department." (Tr. 441-442).

Mr. McGlinchey testified that on two occasions Complainant

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[30] Mr. McGlinchey testified that he expected Mr. Meeks to inform the appropriate union personnel of the meeting with Complainant such that if Complainant had questions, the appropriate personnel would be informed and capable of providing information to Complainant. (Tr. 433-434).

[31] Mr. McGlinchey was informed by Ms. Kent that Complainant telephoned her on the previous Friday to report the spillage. (Tr. 437).

complained about his name being released. Within the week of August 4, 1997, he engaged in a conference call between Complainant, Ms. Kent and Ms. Phillips wherein Complainant questioned Mr. McGlinchey about the release of his name. Complainant specifically asked Mr. McGlinchey if he gave his name to Mr. Meeks. Mr. McGlinchey responded he had provided his name to Mr. Meeks regarding the waiver of union representation but did not relate to Mr. Meeks the details about which Complainant was being interviewed. (Tr. 442-443, 454). Complainant informed Mr. McGlinchey that the word was out among his co-workers and they were upset with Complainant. (Tr. 442-443).

Mr. McGlinchey testified he had a second conversation with Complainant after Complainant returned from vacation in September 1997. He recalled he was in his office when he heard Complainant asking Ms. Kent where was the attorney who had given his name out to the union. Mr. McGlinchey then left his office and spoke with Complainant out in the hall. Mr. McGlinchey testified Complainant was upset that his name was released and inquired how his name was given out to Mr. Meeks. Complainant informed Mr. McGlinchey that Mr. Meeks had then spoke to Mr. Sutton, who related Mr. Coppock's name to Ms. Hopkins. Complainant informed Mr. McGlinchey that his co-workers did not want to work with him. (Tr. 446-448). According to Mr. McGlinchey, he asked Complainant what the company could do to assist him in this matter. (Tr. 459). Moreover, Mr. McGlinchey instructed Complainant to inform Respondent of any threats made to him by any co-workers. (Tr. 460).

Because Complainant raised with Ms. Kent and Ms. Phillips several "human resource issues" such as his light duty assignment, the release of his name to Respondent and being "electrocuted," Margo Parker, vice-president of the human resources division, requested a meeting with Complainant to discuss his concerns. On September 30, 1997, a meeting was held between Mr. McGlinchey, Complainant and Ms. Parker. (Tr. 460-461, 669-670, 676).

Complainant informed Ms. Parker that he was "comfortable" with his current assignment. According to Mr. McGlinchey, Complainant informed Ms. Parker that in the past he had voluntarily worked outside of his work restrictions because he wanted to "carry his own weight." (Tr. 672). In addition, Complainant related to Ms. Parker that his co-workers were giving him the "cold shoulder" and described the break room incident. (Tr. 673). Complainant told Ms. Parker that he was upset because Mr. McGlinchey released his name concerning the July 31, 1997 incident, and that a confidence had been breached by Mr. Scott in April 1997. (Tr. 675-676). Complainant informed Ms. Parker that he requested Mr. Kaylor move him to the board to work so he could work by himself. (Tr. 672, 681).

According to Mr. McGlinchey, Ms. Parker repeatedly asked Complainant whether Respondent could do anything to help his

situation with his co-workers. (Tr. 672, 679-681). Complainant responded to Ms. Parker that Respondent could not make people like or trust him. (Tr. 673-674). Ms. Parker informed Complainant that Respondent was dedicated to making sure "we do what's right" and the company will not tolerate any type of retaliation against him. (Tr. 679). Complainant mentioned that Mr. Wilson had been in the IWT area although he was instructed not to return to the area. (Tr. 678). She informed Complainant he needed to report any such acts of retaliation. Complainant explained he understood everything Ms. Parker stated, however, he was confused because he could not see any openings for promotion. (Tr. 683).

Ms. Parker explained that because of the collective bargaining agreement, if Complainant wanted to become a foreman, when the time came to make a career move, the report made by Complainant concerning the July 31, 1997 spillage would not be part of this evaluation. (Tr. 684).

Ms. Parker asked if being isolated in his work station was his choice and if so, that was fine. She commented that if Complainant wanted a different assignment he needed to inform Respondent. (Tr. 680).

Complainant informed Ms. Parker and Mr. McGlinchey that he had talked to Bruce Kaylor about the atmosphere in the work area and he thought Mr. Kaylor informed the employees that Complainant "did the right thing." (Tr. 686).

David Whitney

Mr. Whitney testified he is the manager of Labor Relations and has held that position since 1995. He has been employed by the company since 1981. His primary function is to administer the various collective bargaining agreements which exist between Respondent and unions representing its employees. (Tr. 553-554). Mr. Whitney testified that in 1992, LOA 31 was negotiated with UAW, Local 848, in which Complainant was a member. (Tr. 554; See RX-1).

According to Mr. Whitney, all UAW union members are to be tested randomly for illegal drugs in accordance with the Department of Transportation standards and protocol. Once an employee tests positive on the first occasion, the employee is suspended from work for five days. The employee is referred to the Employee Assistance Program to see a doctor. An employee who tests positive for drugs a second time within a two year time period is automatically terminated. [32] (Tr. 556-558; RX-1, § 4, ¶¶ C & D; See RX-2). Mr.

[32] LOA 31 does not indicate that a drug test will be randomly performed every thirty days. (Tr. 600). LOA 31 states that an employee who tests positive the first time for illegal drugs will be placed on an accelerated schedule of unannounced

Whitney testified that every employee who has tested positive for illegal drugs a second time within a two year time period has been terminated pursuant to LOA 31. He estimated that twenty-four employees per year are terminated under LOA 31 for testing positive on a second occasion. (Tr. 557).

Mr. Whitney was contacted in April 1997 by Mr. Scott after Complainant tested positive on the first occasion for illegal drugs and was suspended for five days. Mr. Scott informed Mr. Whitney that Complainant returned from his five-day suspension without a doctor's release. Mr. Whitney explained that an employee is required to see a doctor through the Employee Assistance Program during the five-day suspension after which the doctor determines what treatment, if any, would be necessary as a result of the positive drug test. (Tr. 560). According to Mr. Whitney, Mr. Scott informed him that he gave Complainant the doctor's form to be completed and signed. In addition, Mr. Scott recalled instructing Complainant to call the Employee Assistance Program number to arrange an appointment with a physician. Complainant insisted that Mr. Scott did not provide him with the doctor's form. Mr. Whitney testified that in view of the discrepancy between the two individuals, he erred on the side of Complainant and allowed him to return to work and thereafter to seek a doctor's release and the completion of the doctor's form. (Tr. 651).

Later, Mr. Whitney spoke with Mr. Hall concerning Complainant's difficulty receiving a referral to the program and some of Complainant's concerns "about the process." Mr. Whitney informed Mr. Hall to instruct Complainant to place his concerns in writing and Mr. Whitney would contact Mr. Airstrip and request him to address each issue. Complainant submitted a four page, hand-written response concerning the program. (Tr. 562-563; See RX-10). Mr. Whitney attempted to address each of Complainant's concerns and contacted Mr. Scott regarding the breach of confidentiality of Complainant's drug test and the Employee Assistance Program administrator regarding "the referral process." According to Mr. Whitney, he informed "everyone that my foremost concern was getting [Complainant] to see the doctor." (Tr. 563). Mr. Whitney received a signed doctor's form after Complainant returned from suspension. (Tr. 563; See RX-11). He testified that he did not receive a follow-up letter from the Employee Assistance Program which indicated that Complainant was not attending counseling sessions for drug use. (Tr. 577-578 602). In the past, the Employee Assistance Program has notified Respondent that an employee was not complying with the program. (Tr. 603). Mr. Whitney did not indicate the regularity in which he received reports from the Employee Assistance Program indicating an employee was not complying with a treatment program.

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tests for two years following the employee's first positive test. (RX-1, § 4 ¶ c).

Mr. Whitney explained that when Complainant submitted his completed doctor's form, Complainant fulfilled Respondent's requirement to consult with a doctor. (Tr. 564). He further explained that it was not Respondent's policy to follow Complainant's treatment because it was the employee's responsibility "to maintain that treatment protocol." (Tr. 564, ln. 10). LOA 31 does not address an employee's responsibility to comply with a drug treatment program following the mandated five-day suspension from work. (RX-1, § 4).

Mr. Whitney next had contact with Complainant when he tested positive for illegal drugs on a second occasion in October 1997. Mr. Whitney arranged to have Complainant meet with the MRO. In addition, Mr. Whitney advised Mr. McGlinchey of Complainant's pending positive test since Complainant was on a list of employees identified to talk to the Criminal Investigations Division of the EPA. (Tr. 565). After the MRO confirmed Complainant's drug test was positive, Mr. Whitney conducted a termination interview with Complainant.[33] (Tr. 566-567; See RX-17). Mr. Whitney testified that this is the procedure he always follows once an employee tests positive for illegal drugs for a second time within two years. (Tr. 566).

During the termination interview, Mr. Whitney asked Complainant if he would like union representation since it was the "normal course of doing things." According to Mr. Whitney, Complainant indicated he did not need union representation for the meeting because he was "important," that the positive drug test meant nothing, and Mr. Whitney should call Susie Kent to clarify his "status." Mr. Whitney did not call Ms. Kent during the interview but called her only after Complainant left the premises.[34] (Tr. 566-568).

Because of Complainant's situation and his involvement with the EPA investigation, Mr. Whitney went to an adjacent office and called Mr. Sutton to request he attend the termination meeting with Complainant. Once Mr. Sutton arrived, Mr. Whitney returned to his office and proceeded with the termination meeting. Complainant stated that the second positive drug test was a "bogus test." Mr. Whitney asked Complainant if there was anything different in the protocol of this second positive test that he could investigate to

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[33] Mr. Whitney testified he did not review the Medical Review Officer's worksheet or speak to the Medical Review Officer before interviewing Complainant concerning his October 3, 1997 positive drug test. (Tr. 581, 583). He explained that he has never spoken with the MRO. (Tr. 598).

[34] According to Mr. Whitney, he did not tell Complainant that he contacted Ms. Kent and she instructed him to follow the collective bargaining agreement. (Tr. 568).

which Complainant made no response. (Tr. 568-569). Instead, Complainant continued to state that the drug test was a "bogus test." (Tr. 569-570).

Mr. Whitney testified that he and Mr. Sutton informed Complainant that his testing sample was split and then frozen and could be tested at a different laboratory since he disputed the October 3, 1997 test result. The split sample was offered to Complainant, who indicated he was not going to spend $100.00 to have the specimen tested. During the termination interview, Mr. Whitney asked Complainant several times whether there was anything irregular about the manner in which the test sample was obtained to which Complainant did not indicate there was any problem. Moreover, Complainant did not indicate to Mr. Whitney that someone may have tampered with his food and that he may have unknowingly ingested marijuana. (Tr. 570-571).

Mr. Whitney testified that Mr. McGlinchey informed him that following Complainant's termination, Complainant phoned Ms. Kent and left a message for her to call him. Mr. McGlinchey then informed Mr. Whitney that no company representative should speak to Complainant unless Complainant had union representation present. (Tr. 574). Mr. Whitney phoned Complainant from the Security Office which has the capability of recording phone conversations and discussed the fact that Ms. Kent could not speak with Complainant since he had filed a grievance. [35] (Tr. 574-576; See RX-37).

Mr. Whitney testified that he has not seen Complainant's October 9, 1997 drug test results, however, Mr. Hall informed him at an undetermined time that Complainant secured his own independent test which was negative. (Tr. 584-585).

Gayle Blair

Gayle Blair testified she is a medical clerk employed by Respondent. (Tr. 647). As a medical clerk, Ms. Blair is responsible for processing the drug test results for Respondent's random drug testing program and has done so since 1986. (Tr. 648, 653). Ms. Blair receives a computer print-out of an employee's drug test results and then "matche[s] them up to see that they are — — they belong to the right person." If the result is negative, the results are placed in a locked cabinet, [36] however, if the

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[35] Complainant filed a grievance on October 8, 1997 over his "unjust termination" and requested reinstatement. (Tr. 576; CX-15).

[36] Ms. Blair testified that the drug test results are retained by Respondent for a minimum of two years and maintained under lock and key at all times. (Tr. 655).

result is positive, Ms. Blair prepares a worksheet and the employee's chart for review by the MRO. (Tr. 648; See RX-1, § 3 ¶ c).

Ms. Blair explained there is a computer program which pre-selects employees for random drug testing. According to Ms. Blair, the operator can only update the employee data base with information concerning new and terminated employees, and start-up or end the computer program. The program cannot be manipulated to pre-determine which employee will be tested for illegal drugs. Ms. Blair testified that nurses, who are employed by Respondent, collect the samples from the employees. (Tr. 649-650).

Ms. Blair stated that none of Complainant's drug tests have resulted in a false positive. Ms. Blair further testified that a false positive has not been reported during the time she has processed the drug test results. (Tr. 653-654).

Ms. Blair testified that according to the drug test requisition form, Complainant submitted a sample on October 3, 1997. The requisition form reflects the Respondent's account as well as the specimen number for the particular drug test being requisitioned. (Tr. 657-659; See RX-14). As a result of Complainant's positive drug test, Ms. Blair initiated a "confirmed positive worksheet" which was completed by the MRO. Ms. Blair explained that the chain of custody for Complainant's sample was "intact" since all of the identifying numbers matched. In addition, the laboratory personnel would have indicated whether the sample was not received in a container sealed with a tamper-evident seal or if the seal was irregular. (Tr. 657-659; See RX-16). She testified she was not aware of anyone employed by Respondent who had tested positive twice and was not discharged since the commencement of drug testing in 1986. (Tr. 660).

Ms. Blair was unaware of Complainant's October 9, 1997 independent drug test which showed a negative result for marijuana. (Tr. 662; See RX-19). According to Ms. Blair, only a split sample could be used to confirm or negate a positive drug test result. An independent test secured by an employee was irrelevant under the drug testing program policies and procedures. [37] (Tr. 664; See RX-1, § 3 ¶ e).

The Contentions of the Parties

Complainant contends that he engaged in protected activity when he reported the July 31, 1997 spillage incident to Respondent

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[37] It should be noted that LOA 31 provides that Respondent will reimburse an employee for costs if the split sample is tested at an independent lab and the result is negative. (RX-1, § 3 ¶ e).

and to the Environmental Protection Agency.

Complainant contends that Respondent was aware of his protected activity and took adverse action against him when he was terminated. Complainant further contends that he was subjected to a continuing hostile work environment once Respondent released his name to union representatives and indicated that Complainant reported the July 31, 1997 incident.

Respondent admits that Complainant engaged in protected activity of which it was aware.

Respondent contends that Complainant was terminated for legitimate, nondiscriminatory reasons pursuant to the existing Collective Bargaining Agreement, Letter of Agreement 31.

Lastly, Complainant contends that he is entitled to damages encompassing back pay, compensatory damages, and reinstatement to his job position.

III. DISCUSSION

Prefatory to a discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record. See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 (Sec'y Oct. 23, 1995)(Slip Op. p. 4).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ...Credible testimony is that which meets the test of plausibility.

442 F.2d at 52. It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Generally, I find that Complainant presented exaggerated, equivocal, inconsistent and vague testimony throughout the hearing. Complainant was unable to provide specific examples of retaliatory actions by his co-workers or Respondent from the date he reported the July 31, 1997 incident until he went on vacation in August 1997. Complainant explained that the work environment was stressful because he was concerned about the reaction of his co-workers to his report of the incident, however, he was unable to describe any specific actions taken against him by his co-workers. Moreover, Complainant was unable to provide specific examples of retaliation by his co-workers upon his return from vacation on September 14 through October 8, 1997. Instead, Complainant provided only speculation and suspicion of his co-workers' reactions to his report of the spillage.

I further find that Complainant's description of being shocked by placing the cover on an electric panel of a chiller to be exaggerated. Complainant indicated that his injury was serious because it knocked him to the ground, caused him to have difficulty breathing, and caused his arm to go numb, yet, he completed his work shift and did not seek medical attention at any time. Although it may not have been Complainant's responsibility to insure Mr. Kaylor completed an accident report, Complainant did not act in any manner to confirm with Mr. Kaylor that the accident occurred, that it was a "serious" incident nor request authorization to seek medical care. Because Complainant failed to follow-up with the accident report or seek medical attention, I find that Complainant did not find the incident to be as serious at the time it occurred as he did upon testifying.

Complainant initially testified that he was forced to remain working on the board, beginning on approximately September 18, 1997 until October 8, 1997 when he was terminated. He later recanted and testified that he was performing his usual duties from September 18 until sometime after September 30, 1997 at which time he was restricted to work on the board due to his work restrictions from his knee condition.

Complainant alleged in his complaint to the Office of Administrative Law Judges that he was threatened with bodily harm, however, he testified that he was never directly threatened with physical harm. (See ALJX-2, p. 4 ¶ 14; Tr. 111). According to

Complainant, he felt threatened when Mr. Wilson went to the IWT plant although Mr. Wilson was instructed not to enter the area, and when Complainant's wife told him a car was parked outside their home. Because Complainant was not at the IWT plant when Mr. Wilson was present and Complainant provided no further evidence to show that Mr. Wilson wanted any type of interaction with him, I find that the record evidence does not establish Mr. Wilson directly or indirectly threatened Complainant. I further find that Complainant submitted no supporting evidence to show that the car, which appeared on only one day, was parked near Complainant's house to watch or threaten Complainant and his family, and, more importantly, that Respondent was responsible therefor.

Finally, Complainant first testified that his work environment was so stressful that he would have changed to a different shift, however, he never requested a change in shifts. I find that his testimony regarding the work environment is exaggerated since he did not pursue a shift change in order to remove himself from the hostile environment. Although Complainant is not required to change his job position in order to remove himself from a hostile work environment, Complainant testified that he was willing to change shifts, yet when Respondent suggested a shift change, Complainant declined a new shift assignment. Because Complainant's actions are not consistent with his testimony, I find his testimony unreliable and incredulous.

Consequently, I find and conclude that Complainant was not a reliable witness in view of the vagueness, inconsistency and exaggeration of his testimony.

A. The Burdens of Proof.

An employee must establish the following to show unlawful discrimination: (1) Respondent is governed by the Act, [38] (2) the employee engaged in protected activity as defined in the SWD and (3) as a result of engaging in such activity, the employee's terms and conditions of employment were adversely affected. 42 U.S.C. § 6971(a).

The Secretary of Labor has repeatedly articulated the legal framework within which parties litigate in retaliation cases.

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[38] Respondent does not contest that it is governed by the SWD. Moreover, the SWD does not require Respondent to be a member of a specific class to be governed by the SWD. The SWD states that "No person shall fire, or in any other way discriminate . . . against, any employee or any authorized representative of employees . . . ." 42 U.S.C. § 6971(a). Thus, I find and conclude that Respondent is governed by the SWD and Complainant was protected under the employee protection provision.

Under the burdens of persuasion and production in whistleblower proceedings, the complainant first must present a prima facie case. In order to establish a prima facie case, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against the employee. Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995). The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id. See also McCuistion v. TVA, Case No. 89-ERA-6 (Sec'y Nov. 13, 1991)(Slip op. at 5-6).

The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant may counter respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Yule v. Burns International Security Service, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). In any event, the complainant bears the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Dean Darty v. Zack Company of Chicago, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9) (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981)).

Since this case was fully tried on the merits, it is not necessary for the undersigned to determine whether Complainant presented a prima facie case. See Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 @ 6 (Sec'y Feb. 15, 1995), aff'd sub nom Bechtel Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 94-WPC-4 (Sec'y Mar. 15, 1996); Creekmore v. ABB Power Systems Energy Service, Inc., Case No. 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). Once respondent has produced evidence that complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, [39] it no longer serves any analytical purpose to answer the question whether Complainant presented a prima facie case. Instead, the relevant inquiry is

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[39] Upon articulating some legitimate, nondiscriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which is only a burden of production, not persuasion. Texas Dept. of Community Affairs v. Burdine, supra at 253, 256-257, 1093, 1095-1096. The respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for the Respondent. Id. at 255, 1094. Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id. at 257, 1095.

whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. See Reynolds v. Northeast Nuclear Energy Co., Case No. 94-ERA-47 @ 2 (ARB Mar. 31, 1997); Boschuk v. J&L Testing, Inc., Case No. 96-ERA-16 @ 3, n.1 (ARB Sept. 23, 1997); Eiff v. Entergy Operations, Inc., Case No. 96-ERA-42 (ARB Oct. 3, 1997). If Complainant did not prevail by a preponderance of the evidence, it matters not at all whether he presented a prima facie case.

The undersigned finds that as a matter of fact and law, Respondent has articulated a legitimate, nondiscriminatory reason for its actions. See Carroll v. Bechtel Power Corp., Case No. 91-ERA-46, supra. Dr. Weiss testified that Complainant tested positive for the presence of marijuana in April and October 1997. Dr. Woessner and Dr. Weiss testified that the tests used to test Complainant's October 3, 1997 sample [40] were reliable and valid. Moreover, Mr. Whitney testified, without contradiction, that Complainant violated LOA 31 when he tested positive twice for illegal drugs within a two year period. According to Mr. Whitney, LOA 31 mandated that Complainant be terminated. Thus, I find and conclude that Respondent met its burden of production to articulate a legitimate, nondiscriminatory basis for its adverse employment action.

Once Respondent has articulated a legitimate, nondiscriminatory reason for its termination of Complainant, the burden shifts to him to demonstrate that Respondent's proffered motivation was not its true reason but is pre-textual and that its actions were actually based on discriminatory motive. Leveille v. New York Air National Guard, Case No. 94-TSC-3 and 94-TSC-4 @ 7-8 (Sec'y Dec. 11, 1995)(Slip op. at 7-8); Carroll, supra, @ 6; See Bechtel Construction Company, supra, at 934. Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. 42 U.S.C. § 5851(b)(3)(c); Zinn v. University of Missouri, Case No. 93-ERA-34 @ 5 (Sec'y, Jan. 18, 1996); Yellow Freight Systems, Inc., 27 F.3d 1133, 1139 (6th Cir. 1994). Complainant retains the ultimate burden of proving, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity in which he was allegedly engaged in violation of the SWD. Id. (citing Texas Dep't of Community Affairs, supra; See also Creekmore, supra.

1. Complainant engaged in protected activity.

Complainant testified, without contradiction, that he reported the spillage incident to Respondent and later to the EPA. As noted

[40] Complainant did not argue that the first test conducted was unreliable or invalid.

in the contentions of the parties, Respondent admits that Complainant was engaged in protected activity when he reported the incident to Respondent and the EPA. Moreover, Respondent admits that it was aware of Complainant's protected activity.

A complainant is not required to prove an actual violation of the underlying statute. Yellow Freight System, Inc., supra, at 357; Crosier v. Westinghouse Hanford, Case No. 92-CAA-3 @ 4 (Sec'y Jan. 12, 1994). Instead, a complainant's complaint must be made in good faith and "grounded in conditions constituting reasonably perceived violations of the environmental acts." Crosier @ 4; Johnson v. Old Dominion Security, Case No. 86-CAA-3 (Sec'y May 29, 1991). I find that Complainant's complaint to Respondent and the EPA were reasonably perceived as violations under the SWD based on his work experience and his knowledge of the agreement between Respondent and the City of Dallas. Moreover, Complainant testified, without contradiction, [41] that based on the agreement between Respondent and the City of Dallas, the hexavalent chrome levels should be below a specific level when the hazardous waste material is sent to the City of Dallas for further treatment processing. He further testified, without contradiction, that upon beginning his shift, he noticed that the level of the hexavalent chrome was above the acceptable level and continued to be sent to the City of Dallas. Thus, I find and conclude that Complainant's reports of the spillage incident to Respondent and later the EPA were made in good faith and were reasonable and rational.

2. Respondent's alleged discriminatory actions.

Respondent contends that Complainant was terminated from employment because he tested positive for the presence of marijuana on two occasions within a two year time period. Respondent argues that LOA 31 mandated Complainant's termination.

Complainant contends that Respondent falsified, in some manner, the October 3, 1997 drug test and Respondent's true reason for terminating him was because of his protected activity in reporting the spillage incident. Complainant further argues that before being terminated, he was subjected to a hostile work environment because Respondent released his name to union representatives who then released his name to his co-workers.

I find the record evidence does not establish that Complainant was subjected to a hostile work environment because of his

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[41] Respondent submitted two memoranda which were written by representatives of Respondent that indicate the chrome levels were within acceptable parameters. Although these memoranda contradict Complainant's testimony regarding the July 31, 1997 spillage incident, Respondent did not provide further evidence to substantiate these self-serving documents.

protected activity. I further find that Respondent properly terminated Complainant in accordance with LOA 31 when he tested positive for marijuana on two occasions within a two year time period.

(a) Hostile Work Environment. [42]

The concept of a hostile work environment was first developed in the context of employment discrimination based on race and sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2001e, in Meritor Savings & Loan v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986) and later reaffirmed in Harris v. Forklift systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 370 (1993). The Secretary of Labor opined that the factors delineated by the United States Supreme Court are equally applicable to environmental whistleblower statutes. Varnadore v. Oak Ridge Nat'l Laboratory, 92-CAA-2 @ 48 (Sec'y Jan. 26, 1996)(reissued with non-substantive changes on Feb. 5, 1996).

Following the Meritor and Harris reasoning, the Secretary determined that Complainant must establish the following five factors: (1) the Complainant suffered intentional discrimination because of his or her membership in the protected class; (2) the discrimination was pervasive and regular;[43] (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of respondeat superior liability or whether the employer either knew or should have known of the harassment and failed to take prompt, remedial action. Id. @ 48-49; See Waymire v. Harris County, 86 F.3d 424, 428 (5th Cir. 1996).

It is not disputed that Complainant engaged in protected activity. Based on the record evidence, I find that Complainant did not suffer intentional discrimination because of his protected

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[42] Although Respondent questions whether the SWD provides a cause of action for retaliation by permitting a hostile work environment to exist, and if so, what standard of proof should be applied, the SWD employee protection provision clearly admonishes "any other" discrimination against any employee. Notwithstanding the lack of supportive evidence of a hostile environment in this case, I find such allegation to be cognizable under the SWD.

[43] As noted by Respondent, the U.S. Supreme Court recently reaffirmed that to establish a hostile environment claim under Title VII, it must be demonstrated that the conduct was so severe and pervasive that it altered the conditions of employment and created an objectively hostile work environment. Oncale v. Sundowner Offshore Services, Inc., __ U.S. __, 118 S.Ct. 998, 1003 (1998).

activity from the date he reported the incident until he went on vacation in late August 1997. As discussed above, Complainant could not provide specific examples of any retaliatory actions by his co-workers during this time period. Complainant only speculated that his co-workers were angry or upset with him for reporting the incident. Although Complainant may believe he was working in a hostile work environment during this time period from which he may have experienced a high level of stress, he did not provide any record evidence, other than conjecture about his co-workers' reactions, in substantiation of his claim.

Complainant further argues that he suffered a hostile work environment from September 14 through October 8, 1997, the date of his termination. Complainant testified that he felt isolated because his co-workers did not speak to him. Moreover, Complainant heard conversations in which his co-workers were discussing his report of the incident. Lastly, Complainant argues that the incident in which he was "electrocuted" when replacing a cover panel is evidence of the hostile work environment. [44]

(i) Alleged coercion of Complainant to withdraw claim and "change his story."

Paragraph 10 of Complainant's pre-hearing complaint (ALJX-2) alleges without specificity that Respondent attempted to coerce Complainant into withdrawing his claim and changing his story. The only event which could be construed as an attempt at changing Complainant's version of the spillage was Ms. Phillips' August 8, 1997 query whether Complainant may have "possibly observed water flowing into the lake and not hazardous waste." (Tr. 88). Complainant quickly rebuked that scenario. He never testified that Ms. Phillips or any other representative of Respondent asked him to change his "story," adopt a different version of the facts, or to "withdraw his claim." Accordingly, I find and conclude that Complainant failed to substantiate the allegations of paragraph 10 of his complaint.

(ii) The "leak" of Complainant's name to the Union, fellow plant members and to the public.

Paragraph 13 of Complainant's complaint alleges retaliation by Respondent in breaching Complainant's confidences by releasing his name to labor union personnel.

A composite of the credible evidence of record reveals that Mr. McGlinchey informed Mr. Meeks that Complainant would be

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[44] Complainant's argument in brief that he was "shunned and ridiculed" is completely unsupported by any specific record evidence and is found to be factually unsubstantiated and unpersuasive.

interviewed pursuant to an understanding and practice established between Respondent and the Union. Mr. McGlinchey credibly denied informing the Union that Complainant reported the July 31, 1997 environmental spillage or that he would be interviewed about the incident.

Complainant affirmed that his rights were explained to him and that he signed a form acknowledging he had no right to union representation at the August 4, 1997 interview. (Tr. 84; CX-28).

The record is devoid of any evidence that Respondent informed "fellow plant members, and ultimately the public" that Complainant reported the spillage or voluntarily submitted to an interview with Respondent regarding the spillage. Clearly, Mr. Sutton and Ms. Hopkins became aware of Complainant being interviewed by Respondent. In all probability, that disclosure came from the Union.

Moreover, Complainant produced no evidence that co-workers or the general public were aware that he reported the spillage to Respondent. He surmised that his fellow workers knew of his report, but consistently denied such activity when queried about his involvement.

Finally, I find that Respondent's release of Complainant's name to the union representative, Mr. Meeks, did not result in a hostile work environment for Complainant. Respondent incorrectly argues that it was required to provide advance notice to union representatives that Complainant was being interviewed and would not be permitted union representation because no disciplinary action would result. See NLRB v. J. Weingarten, Inc., 450 U.S. 251, 257, 95 S.Ct. 959, 963 (1975). Under Weingarten, a right to union representation arises only in a situation where the union member requests representation when he reasonably believes the investigation will result in disciplinary action. Id. There is no language in Weingarten which requires affirmative action by an employer to notify a union representative that a union member will be interviewed and not permitted union representation. [45] Id. The

[45] Although under Weingarten Mr. McGlinchey had no affirmative duty to notify Mr. Meeks of the interview of Complainant, he may have been required to notify Mr. Meeks under Section 8(a)(5) of the National Labor Relations Act as an established past practice. Under Section 8(a)(5), once past practices and procedures are established, Respondent cannot unilaterally change its practices or procedures. Mr. McGlinchey testified, without contradiction, that it was his practice since February 1995 to contact a union representative in anticipation of an interview with a unit employee which would not result in disciplinary action. It is conceivable that Respondent's release of Complainant's name in conjunction with his protected activity

burden to invoke the right of union representation is placed solely on the employee requiring him to request union representation where he reasonably believes disciplinary action will result from the interview.

Notwithstanding the potential conflict between the employee protection provision of the SWD to prevent harassment and unlawful discrimination against an employee who engages in protected activity and Section 8(a)(5) of the NLRA, I find, based on the testimony of Mr. McGlinchey and Complainant, that Mr. McGlinchey released Complainant's name to Mr. Meeks in conjunction with the interview process but did not divulge the purpose of the interview nor Complainant's protected activity. Moreover, Complainant testified that when he asked Mr. McGlinchey whether he released his name to the union, Mr. McGlinchey responded that he informed Mr. Meeks only that Complainant was going to be interviewed by Respondent and no union representation was permitted. [46] Thus, I find and conclude that Mr. McGlinchey did not release Complainant's name to the union in conjunction with his protected activity. However, such a release, in and of itself, did not constitute a separate act of retaliation as argued by Complainant in brief.

Complainant's reliance upon Neal v. Honeywell, Inc., 995 F.Supp 889 (N.D. Ill. 1998) that "a company who discloses a whistleblower's identity is liable for the resulting harassment of its employees," is clearly misplaced. As Respondent notes in its reply brief, nowhere in the trial court's post-jury verdict decision did it state disclosure of a whistleblower's identity is grounds for liability resulting from harassment by co-employees. In Neal, Respondent's production manager threatened to "break the legs of the whistleblower" but did not name the whistleblower and may not have even known her identity. The Court noted, however, that Neal's identity as a whistleblower "was hardly a carefully guarded secret." Id. at 892-893. Such a statement or variations thereof were critical in determining Neal's state of mind. The Court did not universally hold Respondent liable for actions of its employees because Neal's identity may have been revealed. In fact, Neal was assured protection against repetition of disclosure of her identity. I also note that to the extent the respondent was held

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could result in a hostile work environment given other retaliatory acts or conduct which would be in violation of the employee protection provision of the SWD, however, this issue need not be decided in this matter because there is no evidence Complainant was subjected to a hostile work environment.

[46] It should be noted that although Mr. McGlinchey divulged Complainant's name to Mr. Meeks, he did not provide the names of the other union members to be interviewed. Instead, Mr. McGlinchey indicated he wanted to interview all of the union members at the IWT plant.

responsible for the threat against Neal, it arguably was because of the production manager's supervisory status. There were no threatening remarks attributed to co-workers or deemed the responsibility of the respondent. In the instant case, Complainant has not produced any evidence that he was subjected to threatening remarks. In fact, he has denied being threatened.

I find that Respondent did not breach Complainant's confidence in violation of the SWD as alleged in paragraph 13 of his complaint.

(iii) Respondent's alleged failure to take corrective action to stop the harm or protect Complainant from actions of his co-workers.

Paragraph 14 of Complainant's complaint alleges that Respondent subjected Complainant to harassment and duress on the job, threats of bodily harm, public contempt and ridicule, intimidation and abuse by co-workers and allowed such offensive conduct to continue thereby creating or knowingly abetted in the creation of a hostile work environment.

In brief, Complainant fails to point, with any specificity, to each event or incident that substantiates this broad and vague allegation. Those events about which Complainant testified at hearing are evaluated and analyzed hereafter.

In addition to the allegations previously discussed, Complainant claims he received the "cold shoulder" from co-employees. The only event proffered which arguably could constitute "shunning" or a "cold shoulder" is the one-time departure of first shift employees from the break room as Complainant entered upon his return from vacation. There was no verbal encounter which occurred. Other than pure conjecture, Complainant presented no evidence that the alleged "cold shoulder" occurred because he reported the July 31, 1997 spillage or that it affected his employment in any way.

When Complainant mentioned the incident to his supervisor, Mr. Kaylor, the matter was immediately addressed by Mr. Kaylor holding a meeting with first and second shift employees. As noted, Complainant reported to Mr. Kaylor several days later that "things were better."

Complainant admitted that he was never physically or verbally threatened. (Tr. 259, 261). No evidence of public contempt or ridicule in connection with his protected activity was highlighted in the record. Although Mr. Oatman commented that he was "sick of the crippled people," it is clearly in reference to Complainant's knee condition and his preferential assignment to the control board and not to his protected activity. I so find.

I further find that the incident in which Complainant was allegedly "electrocuted" while performing work activity to be independent of his protected activity. Although Complainant testified that placing the cover on an electric panel was not his usual work activity, he admitted that Mr. Kaylor was unaware of which employee would conduct such work. Based on the inconsistency of Complainant's actions resulting from the "electrocution" incident, his testimony as discussed above, and Mr. Kaylor's lack of knowledge of who would perform the work, I find and conclude that this event was unrelated to Complainant's protected activity.[47]

Complainant explained that he felt unsafe performing his work activity because of the tension with his co-workers, however, he did not provide any evidence to show that his co-workers would not help him perform required work activity or in an emergency situation. I find that without specific examples, other than his co-workers not speaking to him and general conversations regarding his reporting of the incident, Complainant was not subjected to a hostile work environment which was sufficiently severe and pervasive to alter his working conditions and create an abusive work environment. See Harris, 114 S.Ct. at 370.

I find Mr. Kaylor's testimony credible that upon investigating Complainant's concerns of being ignored by his co-workers, Mr. Kaylor determined that Complainant's co-workers continued to treat him in the same manner as they had before he reported the incident. Moreover, Mr. Kaylor testified that he did not observe Complainant's co-workers treat him differently at any time. Consequently, I find and conclude that neither the effect of each incident as described by Complainant nor the overall, composite effect of being ignored by his co-workers, establish that he suffered intentional discrimination as a result of his protected activity.

Complainant did not point to any other specific events of intimidation, abuse, harassment or duress by co-workers in support of this complaint paragraph.

On the other hand, the record supports a conclusion that Respondent did not create or knowingly abet in the creation of a hostile work environment. Complainant failed to produce any evidence in support of his allegations. Complainant acknowledged that representatives of management inquired of him what they could do to assist him and to report any threats made by co-workers. Ms. Phillips emphasized that Respondent was dedicated to doing "what's

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[47] Complainant's description of his alleged "electrocution" as a "near-death experience" which caused him "physical pain and extreme emotional distress and fear" are merely allegations of exaggeration that are devoid of record support. Complainant did not even seek medical attention for his alleged "electrocution."

right" and would not tolerate any type of retaliation against him which needed to be reported. Respondent asked if Complainant desired a different shift and job assignment to remove himself from the alleged hostile work environment. Moreover, Ms. Parker assured Complainant that his protected activity would not affect his pay, vacations, or promotions which were governed by the collective bargaining agreement. I find Complainant's allegation of a hostile work environment based on this paragraph of the complaint to be unsubstantiated by the record evidence.

(iv) The absence of the remaining Meritor and Harris factors.

I further find that there is no record evidence to establish the second and third factors required to show a hostile work environment. Complainant failed to show that his co-workers' actions were sufficiently severe or pervasive to alter the conditions of his employment, create an abusive working environment or have a detrimental effect on him. See Harris, supra at 370. Complainant continued to perform his usual work activity with his co-workers, with the exception of his working on the board, until sometime after September 30, 1997. He did not request a shift change although he admitted being willing to do so. Moreover, Complainant requested assignment to the board for a few days so he could work alone, however, he thereafter requested to return to his usual work activity with his co-workers after working on the board for two or three days.

In addition, Complainant submitted no evidence to show he was detrimentally affected by his co-workers' alleged activity. According to Complainant, he was attending counseling sessions prior to reporting the incident, but he did not indicate whether he attended or wanted to attend additional sessions because of the stress he experienced after he reported the incident. Furthermore, Complainant was not prescribed new or additional medication as a result of the stress he was experiencing after reporting the incident. Notwithstanding Complainant's testimony that he used his three week vacation leave to remove himself from the hostile work environment, I find that such action does not establish a detrimental effect on Complainant because he voluntarily chose to use his vacation leave at that time, provided only speculation about discriminatory behavior by his co-workers prior to using his vacation leave, and continued to receive his regular salary at that time.

Consequently, I find and conclude that the record evidence does not show intentional, discriminatory behavior that is sufficiently severe or pervasive to alter the conditions of his employment, create an abusive working environment or have a detrimental effect on Complainant.

Based on the foregoing, I further find and conclude that the co-workers' actions, which Complainant describes as intentional

discrimination based on his protected activity, would not detrimentally affect a reasonable person of the same protected class in Complainant's position.

Finally, Respondent argues that it cannot be held responsible for actions taken by Complainant's union representatives. Because it has been determined that Complainant did not suffer intentional discrimination which was pervasive and regular and that detrimentally affected him, the fifth factor is moot and will not be discussed.

As discussed above, there is no evidence Complainant was subjected to a hostile work environment because of his protected activity.

(b) The Alleged Discriminatory Discharge.

(i) The positive April 1997 drug test.

It is undisputed that Complainant tested positive for marijuana use in April 1997. He admitted the use of marijuana only days before the test.

Under LOA 31, it was Complainant's responsibility to fulfill the contractual requirements set forth therein. LOA 31 required an employee who tested positive for drug use to serve a five-day suspension, seek and obtain professional help for his drug use and agree to be tested for drug use on an accelerated random basis for two years. Failure to comply with any of the foregoing requirements constituted an independent basis for termination under the collective bargaining agreement.

Complainant served a five-day suspension but did not seek professional counseling as required. Because of a discrepancy between Mr. Scott's direction and Complainant's understanding, Respondent permitted him to return to work and seek counseling thereafter. He enrolled in counseling but did not comply with this requirement because of a conflict with his work schedule.

In Paragraph 16 of his complaint, Complainant alleges alternatively that he was "not even subject to dismissal for this drug test [October 3, 1997] . . . on account of the fact that the company did not follow its own internal procedures for requiring an impaired worker to seek drug rehabilitation after his <u>first</u> offense of discovered drug usage."

Complainant's argument is circuitous and ill-founded. The obligation to fulfill the requirements of LOA 31 are not Respondent's, but Complainant's. His contention that he is insulated from termination for failing a second drug test within two years because he did not obtain proper counseling for his first drug failure is specious. As Respondent argues, Complainant's

failure to comply with LOA 31 constituted independent grounds for discharge. Accordingly, I find Paragraph 16 of the complaint to be baseless and unfounded.

(ii) No evidence of false positive test.

At the hearing, Complainant contended that his October 3, 1997 test was invalid for various reasons advanced by Dr. Woessner. He acknowledged that his first drug test, in 1993, under LOA 31 was not a false positive but was "unreadable." [48] (Tr. 209). He was excused from the next two scheduled tests because he was off from work. (Tr. 209; RX-3). His second drug test occurred on April 15, 1997 and was positive for marijuana. (RX-3).

Dr. Woessner suggested that human error could have caused the October 3, 1997 positive test by "mixing samples" or "concentrating the test sample," thus "doubling the nanograms," however, no evidence was adduced in support of these theories.

Dr. Woessner also hypothesized Complainant's prescription drugs may have caused a false positive. Dr. Woessner testified that the cholesterol lowering medication Complainant was using could skew the results of the test. He explained that the medication could increase or decrease the amount of time marijuana remained in the system. Although the medication may have affected the test results, to which Dr. Weiss agreed, it is inconsequential since the affect would only be germane when marijuana is present, which is a violation of LOA 31. Thus, based on Dr. Woessner's opinion, I find that Complainant's medication did not affect the accuracy of the drug test result indicating marijuana was present in Complainant's system. [49]

Moreover, no evidence was adduced that any of the prescription drugs could provide a reaction simulating a false positive for

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[48] Ms. Blair testified that none of Complainant's drug tests resulted in false positive results. Moreover, no false positive results have been reported to Respondent on any employee during her tenure as medical clerk for Respondent since 1986.

[49] Dr. Woessner further testified that the proximity in time when Complainant consumed the medication and provided the urine specimen could have skewed the result, however, he did not explicate his opinion nor indicate that the results would be a false reading for the presence of marijuana. Furthermore, Complainant did not provide evidence indicating the proximity of time in which he consumed his medication in relation to submitting a urine sample for the October 3, 1997 drug test.

marijuana. Dr. Weiss, who is more highly credentialed and in whose testimony I place more probative value, opined that the prescription drugs involved were not sensitive to such a reaction. Based on the opinions of Dr. Woessner and Dr. Weiss, I find and conclude that Complainant's October 3, 1997 drug test was reliable and accurate for the presence of marijuana. [50]

Dr. Woessner suggested that since Complainant tested negative for drug tests administered on June 30, 1997, July 9, 1997, August 5, 1997 and September 17, 1997 (RX-3), he was clearly not a habitual user of marijuana. However, LOA 31 does not distinguish between habitual and recreational or casual users of marijuana. Moreover, Dr. Woessner's acknowledgment that the prescription drugs used by Complainant were also consumed from April 1997 through October 1997 further diminishes his hypothesis regarding their interaction and capacity to cause a false positive.

Lastly, Complainant raised the "far fetched" theory that he may have ingested marijuana at a shift dinner meal. No evidence was adduced in support of this contention. As Respondent notes, supposition, subjective beliefs and speculative evidence is insufficient to establish a discriminatory discharge claim. See Waggover v. City of Garland, Texas, 987 F.2d 1160, 1164, 1166 (5th Cir. 1993). Complainant testified that he did not detect any substance on his steak which could have been marijuana. Complainant did not indicate whether the steak had a different or strange taste. Furthermore, Dr. Weiss testified it was highly unlikely that ingesting a steak laced with marijuana would result in a positive drug test. He explained that if the steak which Complainant ingested was laced with a significant amount of marijuana, the amount of marijuana present in his body would be less than fifty nanograms and register as a negative on the drug test. Finally, Dr. Woessner testified that he was unsure whether placing marijuana leaves on a steak while cooking it would actually cause the chemicals to be released into the meat and then into an individual's body once ingested.

Although it is Dr. Weiss' custom and practice to ask an employee who tests positive if they unknowingly ingested marijuana,

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[50] It should be noted that Complainant refused to submit his split sample to an independent lab. According to Mr. Whitney, Complainant refused because he did not want to pay for a second test. I find Complainant's reason to be incredible in light of the fact Respondent was contractually required to reimburse Complainant for a negative test result. It is further noted that Complainant paid for second test performed at an independent lab with a new sample.

Complainant did not explain the steak dinner theory to Dr. Weiss on October 8, 1997 or to Mr. Whitney and Mr. Sutton at his termination interview. Thus, I find and conclude that there is no credible evidence that Complainant's positive October 3, 1997 drug test was a result of ingesting steak laced with marijuana which was cooked at the shift dinner meal. [51]

(iii) The positive October 3, 1997 drug test.

Paragraph 15 of Complainant's complaint alleges that Respondent gave him a random drug test in violation of company rules without observance of appropriate medical protocol.

Complainant contends that Respondent falsified his October 3, 1997 test result to warrant his termination for violation of LOA 31. Complainant submitted no direct or circumstantial evidence to show that his urine sample for the drug test was not properly collected and tested in accordance with LOA 31. There is no evidence that Complainant complained to anyone prior to his termination that his sample was collected improperly. Moreover, he signed a document immediately following the collection of his urine sample which indicates that his sample was collected properly. It should be noted that Complainant did not explain the alleged events which took place that tainted his specimen when he submitted a urine sample on October 3, 1997 and how the procedure was improper.

Furthermore, the laboratory confirmed that Complainant's sample was received "intact." Lastly, Ms. Blair confirmed that all of the identifying data for the urine sample matched with Complainant's identifying data. Thus, I find and conclude that the record evidence shows Complainant's urine sample for the October 3, 1997 drug test was collected properly and not tampered with in any manner and appropriate medical protocol was followed.

Complainant did not explicate why his random drug test on October 3, 1997 violated Respondent's rules. His selection for testing was randomly determined by computer software and the date of the test was not out of sequence with previous testing dates. In the absence of any specificity regarding this complaint allegation, I find and conclude that it is meritless.

After his October 8, 1997 discharge, Complainant submitted another urine sample to an independent laboratory on October 9, 1997, which resulted in a negative reading for the presence of marijuana. (CX-11). Dr. Weiss opined that the test results were

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[51] Even Complainant testified that this theory was "far fetched" and "too cloak and dagger" for him. (Tr. 216).

reliable. However, the record fails to demonstrate that the independent test followed appropriate or proper medical protocol. There is no evidence that a proper chain of custody was maintained. The independent test used a threshold level of 100 nanograms/ml for a positive test rather than 50 nanograms/ml required by Respondent's testing.

As noted by Respondent in Brief, it would be expected that Complainant would test negative six days after his October 3, 1997 positive test since "detectable concentrations of the metabolites in marijuana usually fall below the concentration necessary for detection within two to five days after the last use of marijuana." (Respondent's Brief, p. 15; See RX-21, p. 789).

Accordingly, under the totality of the circumstances surrounding the independent test, I find its negative test result to be unpersuasive and irrelevant to the October 3, 1997 positive drug test.

Complainant contends that as a matter of law, proximity in time between the protected activity and the adverse employment action is sufficient to raise an inference of causation. Bechtel, supra, at 934; Couty v. U.S. Dept. of Labor, Sec'y Dole, 886 F.2d 147, 148 (8th Cir. 1989)(Complainant was discharged approximately thirty days after he engaged in protected activity.); White v. The Osage Tribal Council, Case No. 95-SDW-1 @ 4 (ARB Aug. 8, 1997).

Although Complainant was terminated within sixty-five days of engaging in protected activity, he is not protected from disciplinary action or termination due to his own misfeasance in violating established regulations by which his employment was governed. NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 837, 104 S.Ct. 1505, 1514 (1984)(employee cannot engage in protected activity with impunity); Reef Industries Inc. v. NLRB, 952 F.2d 830, 837 (5th Cir. 1991)(employees' right are not absolute, they must be balanced against the employer's long-recognized right to maintain order and respect); Dunham v. Brock, 794 F.2d 1037, 1041 (5th Cir. 1986)(an ERA whistleblower is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct); Conaway v. Instant Oil Change, Inc., Case No. 91-SWD-4 (Sec'y Jan. 5, 1993).

IV. CONCLUSION

For the reasons discussed above, I find and conclude that Complainant failed to present any evidence to show that he was subjected to a hostile work environment because of his protected activity or that Respondent's proffered reasons for his termination are a pretext for discriminatory retaliation. Thus, I find and conclude that Respondent terminated Complainant for legitimate business reasons and not because of his protected activity.

Accordingly, I find and conclude that based on the record evidence, Complainant has not met his burden of proof to demonstrate that Respondent's proffered reasons for his termination were pre-textual but rather were motivated by his protected activity. I further find and conclude that Respondent lawfully terminated Complainant in accordance with the collective bargaining agreement LOA 31 between Respondent and the UAW, Local 848 when he tested positive for marijuana twice within a two year time period.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Respondent has not unlawfully discriminated against Steve Coppock because of his protected activity and his complaint is **DISMISSED.**

ORDERED this 24th day of July 1998, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4390, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed.Reg. 6614 (1998).